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IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

BOISE CITY, A Municipal Corporation of the State of Idaho, Plaintiff in Error,

vs.

ROBERT B. WILSON, EVALINE O'FARRELL, TERESA G. O'FARRELL, ANGELINE O'FARRELL, and R. E. EMMERSON, Defendants in Error.

Appeal from the District Court of the United States for the District of Idaho.

BRIEF OF PLAINTIFF IN ERROR.

C. C. CAVANAH,
Attorney for Plaintiff in Error.

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STATEMENT OF CASE.

This is an action in equity brought to remove several alleged clouds from the title of distinct and separate pieces and parcels of real property by testing the constitutionality of certain sewer assessments levied separately against the property of the defendants in error to pay the cost of a local sewer, constructed by the plaintiff in error in front of the property of said defendants in error. The defendants in error join together in this action and allege, in substance, in their complaint, that they own in severalty certain property situated in Boise City, Idaho; that during the month of March, 1898, the Common Council of Boise City ordered to be laid and constructed in the alleys of

Sewer Districts Numbers Two and Three of said Boise City, a local sewer in front of their said premises; that during the month of November, 1898, said Common Council of said Boise City passed an ordinance levying a special assessment against said property of the defendants in error to pay the cost of said sewer; that each of the defendants in error refused to pay the said amounts so assessed and allowed said property to be sold separately by the City Tax Collector of said Boise City; that the amounts assessed separately against each of defendants' in error property, are, Robert B. Wilson, $365.29; Evaline O'Farrell, Teresa O'Farrell, Angeline O'Farrell, $837.63, and R. E. Emmerson, $125.96. A demurrer to the complaint was filed, argued and overruled by the Court, and the Court, in overruling the demurrer, made and filed its opinion. (Transcript, pp. 22 and 26.)

To the order overruling the demurrer the plaintiff in error then and there duly excepted; the exception was allowed and made a part of the record.

An order was made substituting the names of Eveline O'Farrell, Teresa O'Farrell and Angeline O'Farrell as parties plaintiff in lieu of John O'Farrell, deceased, they being the joint owners of the property of said deceased plaintiff, John O'Farrell. (Transcript p. 33.)

The plaintiff in error then filed its answer, denying specially all the material allegations of the complaint, which answer was, without any objection on the part of the Court or counsel for the defendants in error, permitted to remain on file in the records of this case. (Transcript p. 34.)

Upon the issue so joined the cause was submitted to the Court for decision upon an agreed statement of facts. (Transcript p. 47.)

The Court then filed its opinion upon the agreed state-

ment of facts and rendered judgment for the defendants in error, decreeing that the titles of the property of each defendant are quieted against all claims and demands of the plaintiff in error, and that each of said tax certificates of sale are void and of no legal effect, and perpetually enjoined the plaintiff in error from setting up any claim to said premises. (Transcript pp. 64 and 65.)

Specifications of Error.

The plaintiff in error will rely upon the following errors:

First—The Court erred in holding and deciding that the complaint herein does states facts sufficient to constitute a cause of action; and in overruling defendant's demurrer to said complaint for the following reasons, to wit:

(a) Because the Court had no jurisdiction to hear and determine the matters stated in said complaint.

(b) Because the complaint is multifarious, as it appears therefrom that said complainants are not in any manner in common or jointly interested or concerned and are different owners of distinct and separate pieces and parcels of real property.

(c) Because there is a misjoinder of parties complainants, as it appears from said complaint that there is no community or joint interest between said complainants in regard to the matter in dispute, as complainants are different owners of distinct and separate pieces and parcels of real property.

(d) Because the city charter and said ordinances of the defendant in question, or the levy of said sewer assessments or the subject matter of the action mentioned in said complaint, are not in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States or the laws of the United States, or Section

thirteen, Article one, of the Constitution of the State of Idaho.

(e) Because there are no grounds of equity stated or facts set forth in said complaint to entitle a court of equity to proceed and determine the suit or grant the relief prayed for.

Second—The Court erred in deciding and adjudging that under the evidence in this case said sewer assessments were not levied according to the benfits conferred upon complainants' property, by reason of the construction of said sewer in Sewer Districts Numbers Two and Three of Boise City, and that said lots, blocks and tracts of property against which said assessments were made were not benefited to the amount of each assessment.

Third—The Court erred in deciding and adjudging that under the evidence in this case said sewer assessments were void and of no legal force or effect.

The second, third and fourth assignments of errors set forth in the transcript raises the same principles discussed under the first, second and third assignment of errors relied upon in this brief.

Argument.

In discussing the first and most important question presented by the record, we will consider together (a) and (d) under the first assignment of errors, as they both go to the question as to whether or not the Court had jurisdiction to hear and determine the matters stated in said complaint. We then ask the question, Did the Court err in holding and deciding when ruling upon the demurrer that the Court had jurisdiction to hear and determine the matters recited in said complaint, and that the city charter and ordinances in question of the plaintiff in error and the levy of said sewer assessments are in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States?

The provisions of the city charter of Boise City under which authority is granted to the Common Council of said city to levy said sewer assessments and which the Court is called upon to say whether or not it is in violation of the above provision of the Constitution of the United States, read as follows:

Section 5, Subd. 26. "To open and establish streets, avenues, lanes and alleys and widen the same, and for that purpose to condemn property for the city use, under such regulations as are or may be provided by law. To grade, pave, plank, macadamize, gravel, curb or otherwise improve, repair or beautify the highways, streets, avenues, lanes, alleys and sidewalks of the city; and to provide for the payment of the expense thereof, to levy special assessments upon property that is contiguous to or abutting or fronting upon the highway, street, avenue, lane, alley or sidewalk, to be granded, paved, planked, graveled, curbed, macadamized or otherwise improved or beautified, by such ordinances as in the opinion of the City Council shall secure a just and equitable apportionment of such assessments among the lots or parcels of such contiguous, abutting or fronting property. Special assessments so levied shall constitute a lien upon the property assessed and the payment thereof may be enforced as the payment of taxes on real estate is enforced in said city.

"Twenty-seventh. To divide the city into convenient sewer districts, and upon petition of a majority of the resident property owners of any such district to provide for the construction of, and to construct sewers within such district; the expense thereof to be defrayed by special assessments upon the property contiguous to, or abutting or fronting upon the street, alley, avenue, or lane through or along, or on the line of which the sewer may run. Such

special assessments to be apportioned, levied and collected in the same manner as provided in Subdivision 26 of this section. Approved March 12, 1897. Laws of Alaska 1899, pp. 310-19,

It is undoubtedly the settled rule in the Federal Courts of this country today, that statutes authorizing special assessments to be levied against abutting property for local improvements based on the frontage rule are valid and not in violation of any provision of the Constitution and laws of the United States.

The Supreme Court of the United States has in recent decisions sustained statutes authorizing municipalities to assess and apportion the benefits of a local improvement according to the front foot rule.

Town of Tonawanda et al. vs. James B. Lyon, 21 Sup. Ct. 609.

Mortimer Webster vs. City of Fargo, 21 Sup. Ct. 623.

City of Detroit et al. vs. Ralzemond Parker, 21 Sup. Ct. 624.

Margaret French et al. vs. Barber Asphalt Pav. Co. 21 Sup. Ct. 625.

Gass Farm Company, Ltd. vs. City of Detroit, 21 Sup. Ct. 644.

Wight vs. Davidson, 21 Sup. Ct. 616.

Farrell vs. Commissioners, 21 Sup. Ct. 609.

Lombard vs. Same, 21 Sup. Ct. 507.

White vs. City of Tacoma, 109 Fed. 32.

Zehnder vs. Barber Asphalt Pav. Co. 108 Fed. 570.

We find from the opinion of the learned Judge in the Court below when in deciding this case he held that the rule laid down in the case of Village of Norwood vs. Baker, 172 U. S. 269-303, applied to the case at bar. But upon an examination of the decisions above cited it will be discovered that the Supreme Court of the United States has cor-

rected a misunderstanding of the decision in the case of Village of Norwood vs. Baker, and these late decisions recognize the fact that the per front foot plan may be a fair method of apportioning the cost of a local improvement.

Local assessments of this kind have been universally sustained by the text writers and courts of this country where there has been a special benefit or advantage to the person who owns said property and the property itself.

Munc. Corp. Cases, Vol. 3, p. 652.
Dillon Munc. Corp. Vol. 2, Secs. 752, 761, 809.
Elliott on Roads and Streets, New Ed. pp. 580-582.
Cooley on Const. Lim. pp. 629-634.
Gillett vs. City of Denver, 21 Fed. 822.
Harney vs. Benson (Cal.), 45 Pac. 687.
Rolph vs. City of Fargo, 76 N. W. 242.
Douglas vs. Craig, 46 Pac. 197.
Beaumont vs. City of Wilkesbarre, 21 Atl. 888.
Hutcheson et al. vs. Storrie et al. 48 S. W. 785.
Bacon vs. City of Savannah, 31 S. E. 127.
City of New Wheaton vs. Billingham Ba. Imp. Co., 47 Pac. 236.
Schley vs. Detroit, 45 Mich. 431.
Sears vs. Boston, 43 L. R. A. 834.
City of Raleigh vs. Peace, 17 L. R. A. 330.

Counsel for the defendants in error will undoubtedly rely very much on the case of Norwood vs. Baker. That was a case of the taking of private property for public use—the exercise of eminent domain, and so exercised as to take the property, not only without payment, but so as to charge for the taking. And again, that was an assessment for opening up a street, and a street is public, for the public, and the benefits, and the rule and reason

of the benefits, entirely different from that of a local sewer. In our opinion, that case has no application whatever. It was the taking of the property in such a way as to take all of defendant's land used for the street. It was worse than taking it without pretense of remuneration—worse than simple confiscation.

The language of the Court with regard to the rule laid down of the benefits in that case must be understood as applied to the facts before the Court. And we might pause to ask, if the owners of the lots mentioned in the bill of complaint herein are not to pay for their own local sewerage, who is to pay? Are the owners of other lots in other blocks? Are the owners of all the property, both personal and real, in the city to pay? To compare this case with the case of Norwood vs. Baker is to be blind of the fact that the language of the Court has no meaning except as related to the matter before it. There was the taking of private property, not only without any pay, but the taking under an expense to the owner of $218.58. There the Court had before it the case of an exercise of the right of eminent domain in such a manner as to take private property for public use, and charge the owner $218.58 for so doing. There, too, the use was a public use, general in its nature, but here, in this case, there is nothing tending to show that private property is being taken. It seems to us to be almost a general, self-evident proposition, that the benefits of a local sewer are in proportion to the land fronting on the same.

Since the decision of the Norwood case the Supreme Courts of Michigan, Wisconsin, North Dakota and Minnesota have, following their former decisions, upheld special assessments for a sewer district and for street paving made under State statutes, authorizing such assessments upon the front foot rule and upon the area rule re-

spectively. These decisions, therefore, tender this issue: Does the ruling in the prevailing opinion, in the Norwood case, apply to and determine the validity of all statutory special assessments, based upon front foot rule and area rule of assessment of property, to pay cost of adjacent street paving, sewers, etc.?

The Michigan Supreme Court, in discussing the Norwood case, in an action wherein the Gass Farm Co. vs. Detroit, a suit concerning an assessment for paving in the City of Detroit, made under and according to the State statute, in proportion to the frontage of the property on the street paved, uses the following language:

"We should feel inclined to follow the opinion of the Supreme Court of the United States in Village of Norwood vs. Baker, inasmuch as it was based upon the Fourteenth Amendment of the Constitution of the United States, if that were a paving case, but that was a street opening case, and until that Court shall pass upon the question in the exact form in which it is here presented, we shall feel bound to follow our own decisions."

Gass Farm Co. vs. Dertoit, 83 Northwestern Rep. 108.

The case of Gass Farm Co. vs. Detroit went to the Supreme Court of the United States and the Supreme Court of Michigan was sustained.

Gass Farm Co. vs. Detroit, 21 Supt. Ct. 644, *supra.*

In Heman vs. Allen, the Supreme Court of Missouri, on June 4th, 1900, upheld a special assessment against a parcel of land for a district sewer, constructed under the charter and ordinances of the City of St. Louis, the city being authorized by its charter to create sewer districts in the city and to build sewers. The provision of the charter

under which the assessment was made, prescribing the area rule, reading as follows:

"As soon as a district sewer with its inlets, manholes and other appurtenances is fully completed, said board (public improvements) shall cause to be computed the whole cost thereof and shall assess it as a special tax against all the lots of ground in the district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway."

The Court says of the Norwood case: "The facts upon which the case was decided are so unlike the facts in the case at bar, that we do not think it controlling authority in this." This Court points out very clearly that it was the land of Mrs. Baker that was taken for the street, to pay for which, and the cost of the proceedings.

We call attention to a recent case decided by the Court of Appeals of New York in distinguishing the Norwood case from assessments like the one at bar.

Code vs. Schenectady, 58 N. E. 130.

The Norwood case is also referred to and discussed in the recent decisions of the Supreme Court of the United States cited above.

It was held by the Court below that the charter of Boise City failing to provide in express terms a hearing to be granted to the owners of property who are to be assessed is in violation of the Constitution of the United States, as it would be taking private property without due process of law, but we find that the Supreme Court of the United States in several of its recent decisions used the following language:

Syllabi. "An assessment of the cost of a street improvement, made arbitrarily according to the front foot, is not

in violation of the Constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefited to the amount of the assessment."

City of Detroit et al. vs. Parker, *supra.*
French et al. vs. Barber Asphalt Pav. Co., *supra.*
Town of Tonawanda et al. vs. Lyon, *supra.*
Paulsen vs. City of Portland, 149 U. S. 30, L. Ed.

The city charter in question is not unconstitutional because there is no express provision of notice of an intention to levy an assessment against the property benefited.

Allen vs. Charleston, 111 Mass. 123.
Strowbridge vs. Portland, 8 Or. 83.

The record shows that prior to the levy of the assessments in question notice was given to all persons owning property in said sewer districts of a hearing which was granted to them, and the defendants in error each had knowledge of the same. (Transcript, p. 57.)

As notice was actually given, the proceedings would have been valid even if the charter and ordinances had all been silent upon the matter of notice.

Davidson vs. New Orleans, 96 U. S. 616, L. Ed.
Hager vs. Reclamation Dist. No. 108, 111 U. S. 569, L. Ed.

"It is not essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice to the taxpayer of an assessment for the construction of a sewer.

"Notice by publication is a sufficient notice to the taxpayer in proceedings for the assessment of a tax on his property for the construction of a sewer.

If provision is made for notice to an hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Paulsen et al. vs. City of Portland, 149 U. S. 29, L. Ed.

The great majority of cases which hold to the doctrine that there must be given an opportunity to be heard, admit that it is not necessary that it should be provided for in the charter itself, but it may be provided for by ordinance or resolution of the council, where the charter is silent on the subject.

Notice of an intention to put down sewers, or of the district or property to be assessed therefor, is not necessary unless required in the charter, nor would the charter or ordinances be unconstitutional for want of such notice.

If we are correct in our conclusion that the above decisions of the Supreme Court of the United States upholds the statute and ordinances in question, then the Court had no jurisdiction to proceed and determine this controversy when there is no Federal question involved.

(e) We contend that there are no grounds of equity stated or facts set forth in said complaint to entitle a court of equity to proceed and determine this suit or grant the relief prayed for. Upon an examination of the bill of complaint it will be discovered that there is no allegation tending to establish any act of injustice to have been done to the defendants in error, or either of them, by reason of the construction of said sewer or the levying of said assessment. There is no complaint that said assessments are unjust, unequal or in excess of the amount of benefits derived by said properties by reason of being connected

with said sewer, and we know of no stronger language in which to present this phase of the case than that used by the learned Judge in the Court below when, in deciding the demurrer, after referring to the Norwood case, the Court says: "I can not say that that case so impresses me, when its facts are considered, and it would seem that there is reason left to apply a different rule to a case like this. In that case there was not only an actual taking of private property for public use, and not only without any compensation, but costs for the taking were charged to the owner. Here, there is no taking of property, but a necessary improvement is put upon public land for the benefit and convenience of the owners of the abutting property, as well as for the health of the community. It was a necessary and unavoidable improvement; if we consider at all the health and convenience of the people, its cost was assessed in the only equitable and just way that it can be." (Transcript, pp. 30 and 31.)

As has been said above, the complainants nowhere show nor claim that they would be injured by the rule of assessment followed in regard to this local sewer. They do not even claim that the proportion of frontage does not measure their respective proportions of benefit derived from the building of the sewer. In fact, so far as their complaint is concerned, it may be that they are each benefited more by the rule which has been followed than by any other rule of adjustment that could be made. The rules with regard to adjustment of benefits for public parks, for sidewalks, for streets, and for sewers are not exactly the same. The public has more use of the street, and still more of the park, and of the sidewalk it may be said, and has been said, that it is more particularly for the benefit of the lot along which it is built than is the public street; but of the local sewer it is apparent that the benefit is al-

most wholly and solely to the persons who own property abutting upon the same? Yet learned counsel seems to discussed the question as if *per se* the rule adjusting assessments by the front foot was illegal, unconstitutional and void. The authorities do not agree with him, and I believe he has found, and can find, no authority against such a rule where the assessment was for a local sewer. It is but right for each lot owner to build his own fence or wall to keep out live stock and equally proper for him to build his own wall along his own premises, to fortify them against the poisoning infection of his own microbes, and the sewer is such a wall. Let every man build the wall over against his own house and the city will be fortified against the enemy disease.

We believe it to be the correct rule that the Federal Courts will not consider the question as to whether a State statute was constitutionally enacted or whether it is in collision with the State constitution where there is no diversity of citizenship alleged, as it does not involve a Federal question.

Jackson vs. Lampshire, 29 U. S. 278, L. Ed.

McCain et al vs. City of Des Moines et al. 84 Fed. 726.

This question was decided by the court below in favor of our contention. (Transcript p. 28.)

Second—Did the Court err in holding and deciding when ruling upon the demurrer that the complaint herein was not multifarious and there is not a misjoinder of parties complainants in this action?

The plaintiff in error contends that under the facts disclosed by the complaint that there is a misjoinder of parties plaintiff and causes of action in this case, because it appears from the complaint that the defendants in error

are different owners of distinct and separate pieces and parcels of real property; that there is no common pecuniary interest in one another's property; that the amounts of their assessments are different; that separate tax certificates of sale have been issued to the plaintiff in error covering said properties; that each of defendants in error are endeavoring to remove separate alleged clouds from his or her property; that they are jointly asking the Court to quiet title to their separate and unconnected descriptions of property by declaring void three separate tax certifiates of sale, in one complaint. (Transcript, pp. 1 to 18, inc.)

The general rule in equity cases is, that owners in severalty of separate and distinct parcels of land who are endeavoring to remove a cloud from their property, can not join together or unite their grievances in one action and complaint, as there is no community or joint interest in one another's property.

Greene vs. Liter, 8 Cranch, 229.

Cutting et al. vs. Gilbert et al. 6 Fed. Cas., No. 3, 519.

Summerlin et al. vs. Fronteriza S. Min. & M. Co. et al. 41 Fed. 249.

Stebbins et al. vs. S. T. Anne et al. 116 U. S. 667, L. Ed.

Security Sav. & Loan Assn. vs. Bushman et al. 14 U. S. Ct. App. 97.

Ex Parte Baltimore & O. R. Co. 106 U. S. 78, L. Ed.

Sioux Falls Nat. Bank vs. Swenson et al. 48 Fed. 621, 625.

In the case of Cutting et al. vs. Gilbert et al. *supra*, which was a bill in equity filed in the Circuit Court for the Southern District of New York by six firms licensed

and doing business as bankers and brokers under the Internal Revenue Laws of the United States, against the assessor and collector of the district contesting the legality of the tax, it was held by Justice Nelson that, "In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved, which alone can not lay a foundation for a joinder of parties; * * * to allow them to be made parties to the suit would confound the established order of judicial proceedings and lead to endless perplexity and confusion. I am satisfied, therefore, that this bill can not be sustained, on account of the joinder of improper parties as plaintiffs."

The Supreme Court of the United States, in discussing this subject in the case of Greene vs. Liter, *supra*, said: "If there are several tenants, claiming several parcels of land by distinct titles, they can not lawfully be joined in one suit, and if they are, they may plead an abatement of the writ."

In the action below, a suit in equity was brought by nine persons owning property in severalty to restrain the Board of Public Works of said District from proceeding to collect certain special assessments which had been assessed against certain property, fronting on the avenue, to pay the costs of an improvement constructed on New York avenue. The Court, in an able opinion, written by Justice McArthur, said: "Syllabi. Individual taxpayers whose property has been separately assessed has not that community of interest which will allow them to unite in the bill of complaint to restrain the collection of taxes alleged to be legally assessed, on the ground of preventing a multiplicity of suits."

Harkness vs. Board of Public Works, 1 McArthur, 121.

In the above case the decisions from the Supreme Courts of Wisconsin and Connecticut were considered and approved by the Court.

There can be no community of joint interest in the subject of litigation, which is a removing of three separate alleged clouds from the title of each plaintiff. If the assessments in question are not legal, then there may be an apparent cloud to the amount so assessed on each lot. Each plaintiff is interested only in removing this cloud from his own lots, and not from the lots belonging respectively to his coplaintiff.

There is no such common pecuniary interests as authorizes them to unite in one suit as plaintiffs to obtain the relief asked. Each can sue alone, and the others are not necessary parties. This is not an action respecting a common fund, nor to restrain acts injurious to property in which all the plaintiffs have a common or joint interest. But the plaintiffs set forth separate causes of actions, one in favor of each plaintiff. Their property is situated in two different sewer districts in the city. The sum demanded of each is distinct and separate, and it does not concern one of the complainants whether another pays or not. All the joint interests the parties have is a joint interest in a question of law; just such an interest as might exist in any case where separate demands are made of several persons.

In support of the same rule, we invite the Court's attention to the following decisions of the State Courts:

Dodd et al. vs. City of Hartford, 25 Conn. 231.
Brunner et al. vs. Bay City et al. 46 Mich. 236.
Newcomb vs. Horton, 18 Wis. 594.
Barner et al. vs. The City of Beloit, 19 Wis. 93.
Carey vs. Brown et al. 58 Cal. 180, 183.
Jones et al. vs. Cardwell et al. 98 Ind. 331.

This question is well explained by the Supreme Court of Connecticut in the case of Dodd et al. vs. City of Hartford, *supra*, where a joint petition was filed to restrain the collection from several complainants of sewer assessments made upon their lands, severally, and which were claimed to be illegal. The Court said: "The claim most pressed by the petitioners is that the Court ought to entertain jurisdiction in order to prevent a multiplicity of suits. But no one of these petitioners has any interest in the suit which another of them may be called upon to institute. They can not individually complain that others are compelled to sue, for they have no share in the expense or vexation of each other's suits. The multiplicity of suits which the petition seeks to avoid does not affect injuriously any one of the petitioners. No one of them has any occasion to expect any such multiplicity affecting himself. One suit is all that any one of them has to fear, and the object of this bill would seem to be to relieve these parties, severally, from that one suit, and to consolidate the apprehended litigation. In other words, to enforce a consolidated rule, by means of the extraordinary powers of a court of chancery. If the assessment were against one person, only, it is not claimed that he could transfer from a court of law to a court of equity, the question of his liability. But how is the condition of any one of these petitioners the worse, because others are assessed for the same improvement? It would undoubtedly be convenient to try the questions relating to these warrants in one comprehensive law suit. But it does not seem to the Court that the case presented by the bill is one of such irreparable injury or of inadequate relief at law, as to warrant us in taking it away from the legal tribunals."

The Supreme Court of Michigan says: "This is a bill filed by a large number of persons whose lots have been

bid in by Bay City under a sewer assessment to have the sales set aside as illegal."

"Syllabi. Joint suits will not lie in a case in which there is no common interest on one side or the other. A joint bill for relief against a tax sale will not lie where the complainants have no common grievance beyond being owners in severalty of distinct parcels of land sold for the tax."

Brunner et al. vs. Bay City et al. *supra.*

Says the Supreme Court of Wisconsin: "There is no general or common interest affected by the assessment and tax in this case. The property is owned in severalty, and each taxpayer may sue alone and obtain complete relief so far as his rights and property are concerned. There is no necessity for one taxpayer to unite another with him in a suit for this purpose."

Newcomb vs. Horton, *supra.*

"Two or more lot owners in a city can not unite in an action to restrain the sale of lots owned by them, severally, for taxes illegally assessed, or to prevent the execution of deeds for such lots upon such sale; but each must bring his several suit."

Barnes et al. vs. The City of Beloit, *supra.*

The rule is laid down in Texas that "a joint action by several claiming separate and distinct portions of a league of land, brought to recover their respective parts, is irregular, and an objection to such joint action, if made at a proper time and in a proper manner, should be sustained."

Allen et al. vs. Read et al. 66 Tex. 13.

The case below is one directly in point. A special as-

sessment was levied by the City Council of Portland against certain property to pay the expense of a sewer, and the Supreme Court of Oregon said: "Syllabi. *Held*, that where an assessment is levied upon property for a share of the cost of local improvement, which is so situaated that it can not possibly be benefited thereby, the owner of the property may maintain a suit to prevent the enforcement of the assessment; but that different owners of distinct parcels of property so assessed have no right to join as plaintiffs in such suit."

Poulsen et al. vs. City of Portland, 1 L. R. A. 673.

The above cause went to the Supreme Court of the United States and, in an opinion written by Justice Brewer, the decision of the Supreme Court of Oregon, holding that the assessment was legal and the property owners could not recover in the action, was sustained.

Poulson et al. vs. City of Portland, 149 U. S. 29, L. Ed.

In the case below, which was an action to quiet title under three tax deeds upon different tracts owned by different owners, the Court said: "Syllabi. Complaint (under Chapter 22, Laws of 1859) to quiet title by the holder of three tax deeds upon different tracts, where the former owners were different, except that one defendant was owner of some of the parcels named in each deed. *Held*, that there was a misjoinder of causes of action."

Turner vs. Duchman, 23 Wis. 500.

"A bill by a number of owners of lots to restrain the prosecution of individual ejectment suits against them by one claiming a dower interest in the lots is multifarious."

Douglas et al. vs. Boardman et al. 71 N. W. 1100.

In the case below, where thirteen plaintiffs brought an action to remove a cloud upon the titles of their respective pieces of land, caused by a mortgage upon the whole of said land, and on demurrer the question that several causes of action have been improperly united, and in speaking of whether one of them had an interest in the lands of the others, the Court said: "Briefly stated, what is attempted here is to unite in one action several distinct and separate causes of action existing in favor of distinct parties, whose interests are several, and neither of whom has any interest in the cause of the others."

Utterback et al. vs. Meeker et ux. 16 Wash. 185.

In the cause below the Supreme Court of Kansas holds that two plaintiffs can not join in one action to test the legality of a tax upon property owned by them in severalty.

Hudson vs. Atchison, 12 Kan. 140.

We can not see how the defendants in error have a right to join as complainants in a suit to obtain the relief asked for in their complaint, as the assessment and attempted enforcement of it are the grounds of the complaint, and, as respects each owner of said properties, are several in their nature—are distinct acts.

In the case below Johnston Moore filed a bill in equity against one McNutt, who was Commissioner of School Lands and who had instituted a proceeding to sell certain tracts of land belonging to said Moore, which had been sold for non-payment of taxes. The other persons also claimed title to certain parts of said lands and were made defendants with McNutt. The Court said: "I think the bill is multifarious. It brings three different tracts of land with their different titles and different owners.

What interests in common have they? Why involve the owner of one distinct tract with matters of evidence and law pertaining exclusively to another tract and its owner? There is no bond in common, no unity or common interest between those four tracts, save that they are adverse to the plaintiff's claim; and that is no bond between them, giving them any affinity to one another."

Moore vs. McNutt, Commissioner, et al. 24 S. E. 682-684.

It would certainly require entirely different facts in this case to settle the question as to whether the separate lands of each defendant in error were benefited to the amount of each assessment by reason of the construction of the sewer, as the amount, location, and valuation of each description of said property are different. The amounts of the claims which the plaintiff in error holds against the property of each of the defendants in error are different, and whether the defendant made an examination of the extent of the benefits which the property of each of defendants in error would derive by reason of the construction of said sewer would also require different proof.

In an action brought by several persons to quiet title to their property, where there were no community of interests between the plaintiffs in the property, and a joint judgment entered against the defendant perpetually enjoining the defendant from disposing of the same, the judgment was erroneous, as there was no such community of interests between the plaintiffs in the property in question as entitled them to such a decree.

Gibbons vs. Peralta et al. 21 Cal. 630.

A case bearing a strong analogy to the one before the

Court is the late case of Wheeler et al. vs. City of St. Louis, which went to the Supreme Court of the United States. Says that Court:

"Syllabi. Distinct and separate interests of complainants in a suit for relief against assessments, whether they have been made or merely threatened, can not be united for the purpose of making up the amount necessary to give jurisdiction to a Circuit Court of the United States."

Wheeler et al. vs. City of St. Louis, 179 U. S. 402.
Wheeler et al. vs. City of St. Louis, 96 Fed. 865.

It seems to be the established rule of the Federal Courts in this country, that several persons can not join together in one suit for the purpose of restraining the collection of taxes, as there is no common interest between the owners in the property assessed or in the tax. In all of these cases the Federal Courts discuss the question of there being no joint or unity of interest in the property to be affected by the tax. The reasoning of the courts in these cases are applicable to the one before the Court when in considering the question as to whether there is any community or joint interest between the defendants in error in the properties affected by these assessments which would not entitle them all to join in one suit.

Ex Parte Baltimore & O. R. Co. *supra.*
Ballard Paving Co. et al vs. Mulford et al. 100 U. S. 591, L. Ed.
Russell vs. Stansell, 105 U. S. 989, L. Ed.
Seaver vs. Bigelow, 5 Wall. 208.

Believing as we do that the above authorities are decisive of this case and clearly establishes the fact that the lower Court erred in overruling the plaintiffs' in error demurrer and rendering judgment in favor the de-

fendants in error, yet there is one other question which we desire to briefly present to the Court, as it was presented to and ruled upon by the Court below.

Third—As the second and third assignments of error set forth in our brief involve a discussion of the evidence we will consider them together. Did the Court err in deciding and adjudging that under the evidence said sewer assessments were not levied according to the benefits conferred upon complainants' property by reason of the construction of said sewer in said districts, and that said lots, blocks and tracts of property against which said assessments were made were not benefited to the amount of each assessment, and declaring said assessments void, of no legal force or effect?

A brief analysis of the evidence as disclosed by the agreed statement of facts shows that the City Council of Boise City received and accepted a petition in writing signed by more than a majority of the resident property owners in said Sewer Districts Two and Three, asking for the construction of said sewer; that notice was published in a daily newspaper in Boise City inviting proposals and bids for the laying of said sewer; that after the total cost of the construction of said sewer had been estimated and determined, and prior to the levy of said assessments, the City Council of said city caused notice of the intention of said council to levy a local or special assessment upon and against all property fronting or abutting upon or contiguous to that portion of said Sewer Districts Two and Three to be duly published in a daily newspaper once each day for ten days, specifying a time and place when and where the council would meet to receive, hear and determine any and all objections or complaints against said assessments or the levy thereof any owner of any said property might have to make; that said

meeting was duly held and a hearing was granted to all property owners in said districts to present any reason, complaint or objection why said sewer should not be constructed; that said complainants all had knowledge of said meeting prior to the holding of the same and did not appear or file any objection against the laying of said sewer or said levy; that prior to the levy of said assessment the City Council duly appointed a special committee, together with the City Engineer, to examine into the necessity of and the amount of benefit said sewer would be to said properties to be assessed, and said committee made their report to said council and the same was received and accepted by the Mayor and Council of said city; that in said report it was stated that it was, in the opinion of said engineer and special committee, necessary in the protection of the health of all persons residing in said city and it would be a benefit to each description of property in said districts to construct said sewer; that at said meeting said Mayor and Council considered and determined that all of said property would receive a benefit greater than the amount of said assessment by reason of the construction of said sewer; that the cost of said sewer was reasonable and could not have been laid at a lower cost unless at a loss; that said Sewer Districts Two and Three are situated in the thickly settled part of the residences of said city; that complainants' and other persons' homes are upon the properties against which said assessments were levied; that by reason of the construction of said sewer the values of said properties in said districts have been enhanced; that all of the property owners, except complainants in said districts, have paid to said city the amount of the assessments so levied against their properties. (Transcript, pp. 47 to 63 inc.)

As to the objection raised in paragraph nine in the complaint of the defendants in error, the same was denied in the answer of plaintiff in error, and there being no evidence offered establishing that fact, we deem it unnecessary to discuss the same as it was made an issue by the pleadings and no evidence is in the record upon that question. (Transcript, pp. 10 and 39.)

We earnestly insist that under the law governing the principles presented by the record in this case the judgment of the Court below is erroneous and should be reversed.

Respectfully submitted,

C. C. CAVANAH,

Solicitor and of Counsel for Plaintiff in Error.